

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 EDC 1795

DECISION GRANTING SUMMARY JUDGMENT

Fred G. Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 EDC 1795

Student, by parents,)
MR. PARENT and MRS. PARENT,)
Petitioner,)
vs.)
NEW HANOVER COUNTY SCHOOLS,)
Respondent.)

ORDER

THIS MATTER COMING ON TO BE HEARD upon Respondent's Motion for Show Cause and Fourth Motion for Sanctions and the undersigned, having considered the Motion of Respondent, the Petitioner's Response to New Hanover County Schools' Motion for Show Cause Order and Fourth Motion for New Sanctions, and the arguments of counsel for both parties, finds as follows:

1. One week after the filing of the Due Process Petition, Respondent served by hand delivery on the Petitioner its First Set of Interrogatories and Request for Production of Documents on November 1, 2002, to which responses were due by November 18, 2002, one week prior to the original trial date of November 25, 2002. Respondent's Request for Production No. 6 requested that Petitioner provide "[all medical, psychological, hospital and doctor's records including but not limited to admission and discharge summaries, notes, reports, test results, x-rays, and correspondence which relate in any way to *Student's* depression, ADD, mononucleosis, or any other alleged disability." The Honorable Beryl Wade allowed an extension of time within which to respond until December 3, 2002. The original trial date was then continued to January 13, 2003, upon Joint Motion of the parties.

2. On January 17, 2003, Respondent filed a Motion to Compel which was granted on January 21, 2003. In said Order, Judge Wade ordered that Petitioner, *pro se*, fully and adequately respond to Respondent's discovery requests within ten (10) days.

3. Petitioner thereafter filed a "Motion for Extension of Time to Respond to Order to Compel with and Production of Documents" to which Respondent filed a Response on February 7, 2003. The ALJ then entered an Order on February 11, 2003, finding that Petitioner had failed to fully and adequately respond to Respondent's discovery requests and granting an additional ten (10) days in which to comply. The ALJ further stated that "[i]f Petitioner fails to comply with this Order, this Court shall entertain a further Motion for Sanctions by Respondent and order the dismissal of this action."

4. Petitioner filed a Motion for a Protective Order which sought to have Respondent restrained from discovering certain medical and psychological records. Respondent filed its

Response to said Motion on March 4, 2003. On April 1, 2003, the ALJ conducted a telephone hearing on the Petitioner's Motion and entered an Order on April 3, 2003, denying Petitioner's Motion for Protective Order and ordering Petitioner to fully and adequately respond to Respondent's discovery requests, including providing all records responsive to Respondent's Request for Production of Documents No. 6 regarding medical and psychological records by April 23, 2003. The ALJ further ordered that the medical and psychological documentation produced by Petitioner not be disclosed outside of this pending action.

5. On March 24, 2003, Respondent filed its first Motion for Sanctions based on Petitioner's continued failure to comply with previous orders.

6. Petitioner's Motion for Protective Order was denied again in its reconsideration during an April 14, 2003, telephone conference with ALJ Wade.

7. Respondent filed a Second Motion for Sanctions on April 25, 2003, seeking dismissal of this action as a sanction for Petitioner's repeated failure and refusal to comply with prior Orders compelling discovery as well as their reasonable expenses in preparing the Motion. After four (4) additional telephone conferences regarding the production of documents by Petitioner, ALJ Wade held the motion and a ruling in abeyance pending reassignment to another Administrative Law Judge.

8. On May 29, 2003, Respondent filed their Third Motion for Sanctions citing four (4) records from medical providers that Petitioner had failed to produce and seeking further expenses and attorneys' fees and dismissal of the Petition as sanctions for Petitioner's continued failure and refusal to fully comply with previous orders.

9. At the hearing on June 9, 2003, conducted by ALJ Augustus B. Elkins, II, on Respondent's Third Motion for Sanctions, PARENT testified that she had produced all documents responsive to Respondent's Request for Production and stated that "[t]here is nothing out there that you don't have," "[y]ou have everything," "I have given you everything."

10. On June 18, 2003, Judge Elkins entered an order on Respondent's Third Motion for Sanctions. Contrary to the finding of Judge Wade in her Order of May 12, 2003, that Petitioner had intentionally refused to comply with the previous orders, Judge Elkins found that PARENT's failures to comply with the Orders were excusable up to the April 3, 2003, Order. ALJ Elkins further found that by the Order of April 3, 2003, PARENT understood that her Protective Order was denied and that her actions between April 3 and April 23, 2003, showed a "willful disobedience and failure to comply with the Order of Judge Wade" and were "those actions contemplated and addressed by Rule 37 of the Rules of Civil Procedure." Judge Elkins found that, in early May 2003, after seeing her Petition may soon be dismissed, Petitioner attempted to turn over all documents to Respondent by around May 14, 2003, with several others following May 21 and May 23, 2003, and that, as of the Motions Hearing dates, Respondent had received the vast majority of records from Petitioner. The Court granted the request for Sanctions, though denied the request for dismissal of the action, and directed the Petitioner to pay Respondent the sum of \$150.00 as a sanction by July 14, 2003.

11. On May 5, 2003, Petitioner produced to Respondent a Discharge Summary Report from Dr. Carmel Colgrove at UNC Hospitals dated October 31, 2001, regarding *Student's* admission to UNC Hospitals from October **, 2001, to October **, 2001. An exact copy of the report produced by PARENT on May 5, 2003, was attached to Respondent's Motion as Exhibit A.

12. On July 2, 2003, at the deposition of PARENT, Petitioner's new attorney, Andrew Hanley, produced to Respondent's counsel a different version of Dr. Colgrove's report which was attached to Respondent's Motion as Exhibit B.

13. Under cross-examination in her deposition and in her Response to the Motion, PARENT admitted that Exhibit A is not a genuine copy of Dr. Colgrove's report and that she had taken Dr. Colgrove's actual report, and "corrected" it so she could delete certain references in paragraph 3 on page 4 regarding *Student's* polysubstance abuse. PARENT testified in her deposition and in her Affidavit submitted in Response to Respondent's Motion that she altered the document intentionally because she believed it was inaccurate.

14. However, a comparison of the report now represented by Petitioner as being genuine (Exhibit B) to the forged report (Exhibit A) shows that PARENT also made extensive and substantial deletions and revisions to paragraph 1 of the report so as to downplay mention of *Student's* abusive boyfriend, and deleted the word "always" in paragraph 4 of the report to attempt to mitigate the severity of *Student's* oppositional behavior. PARENT copied the font, layout and format of Dr. Colgrove's report very closely to make it seem legitimate and to fool Respondent and its counsel into believing that it was authentic. Moreover, instead of blacking out the sentences she objected to, she re-typed the entire report which required her to change the pagination. Petitioner has failed as of this date to produce any amendment by the appropriate physician at UNC Hospital to *Student's* official medical record.

15. It is clear that PARENT intentionally altered this report for her own purposes before submitting it because she did not want to provide the deleted information even though an ALJ had repeatedly found that the requested records were relevant to this proceeding and properly sought under Rule 34 of the Rules of Civil Procedure and denied Petitioners' Motion for Protective Order. PARENT went to great length to conceal the changes that she made to the document and it is apparent that she was fully aware that her actions were inappropriate and a direct violation of previous Orders.

16. PARENT has demonstrated a pattern of willful disobedience of and resistance to ALJ Orders to produce *Student's* medical and psychological records. She has established a pattern of disregarding due dates for responding to discovery and ignoring orders requiring her to fully respond to discovery requests.

17. PARENT has intentionally and fraudulently altered a medical record produced in discovery to Respondent. Furthermore, PARENT was not candid when she testified under oath at the hearing on June 9, 2003, that she had provided to Respondent all of the medical and psychological records that she had received.

18. PARENT's conduct was inexcusable and is not to be condoned.

19. PARENT's surreptitious conduct has called into question whether she has altered other medical/psychological records, totaling approximately 1099 pages that she has produced in discovery in this case. In order to verify whether the other records produced by PARENT are genuine, Respondent would have to subpoena the records from the providers and compare their records line by line with the records produced by PARENT, which is clearly unreasonable and would be highly prejudicial to Respondent.

20. Petitioner has been given nine months within which to fully and adequately respond to Respondent's discovery requests and ample time to comply with previous Orders compelling discovery. Petitioner has failed to do so.

21. Continuing the trial date of this matter again to allow Respondent time to subpoena, obtain and verify the authenticity of the approximately 1099 pages of medical and psychological records will only act to further prejudice Respondent.

22. The undersigned has considered lesser or greater sanctions than striking out Petitioner's pleadings, affidavits, and discovery responses; however, in my discretion, I find that these sanctions are appropriate under the facts of this case.

23. Respondent seeks attorney's fees in the sum of \$593.75 in researching and preparing the Respondent's Fourth Motion for Sanctions, citing the time spent on the Motion and citing a discounted fee of \$125.00 per hour. Respondent's counsel, Wayne A. Bullard and Stacey L. Fuller, are experienced and competent attorneys in IDEA cases. The undersigned finds that the time spent by Mr. Bullard and Ms. Fuller is reasonable and their hourly rates of \$125.00 per hour are reasonable and below the standard and prevailing rates of other competent and experienced attorneys in IDEA litigation in Eastern North Carolina. Said fees are reasonable and necessary.

IT IS HEREBY ORDERED that, as a sanction for failing to comply with prior ALJ Orders and for intentionally altering a medical record produced in discovery, and pursuant to N.C.G.S. §150B-33(b)(10), 26 NCAC 3.0114, and Rule 37(b) of the North Carolina Rules of Civil Procedure, Petitioner's pleadings, affidavits and discovery responses are hereby stricken. Petitioner shall pay the Respondent's counsel a reasonable attorneys' fee in the sum of \$593.75 within ten (10) days of the date of this Order.

IT IS SO ORDERED.

This the 25th day of August, 2003.

Fred G. Morrison Jr.
Senior Administrative Law Judge